IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-377

GILBERT D. SCUDDER,

Appellant,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,
L. M. FOLSOM and PAULINE
FOLSOM, his wife,

Appellees.

On Appeal from the Supreme Court of the

State of Florida

Motion to Dismiss Appeal

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MOTION OF APPELLEES,
L. M. FOLSOM and PAULINE FOLSOM, HIS WIFE,
TO DISMISS APPEAL

Appellees, L. M. FOLSOM and PAULINE FOLSOM, his wife, move that this appeal be dismissed on the ground that it does not present a substantial federal question and in supprt thereof they present the following agrument and authorities.

The appellant contends that Section 704.01(2) and 704.04, Florida Statutes, which established what is commonly called a statutory way of necessity whereby a private property owner, under certain defined circumstances, may have an access easement to his property over the land of another private property owner, are violative of the equal protection clause and the due process clause of the Fourteenth Amendment to the United States Constitution for four reasons which, summarized, are:

(1) The statutes violate the due process clause by allowing the taking of private property for a private purpose;

(2) The manner of the taking in this case violated the due process clause;

(3) The statutes violate the due process clause because, by failing to provide for attorney fees to be awarded or taxed as costs, they do not provide just compensation to the servient tenant; and

(4) The statutes violate the equal protection clause by creating a classification in

which attorney fees are not awarded while in eminent domain proceedings under Florida law attorney fees are awarded. The appellees will address these questions in the order enumerated.

I.

Florida Statutes 704.01(2) and 704.04 do not violate the Fourteenth Amendment of the United States Constitution by allowing the taking of private property for a private purpose. In Deseret Ranches of Florida, Inc. v. Bowman, 349 S. 2d 155 (Fla. 1977), the Supreme Court of Florida declared that these statutes serve a purpose that is predominently public. The Court found that the State has an interest in preserving access to lands within its boundaries so that their productivity might be utilized. There is no reason that the Fourteenth Amendment of the United States Constitution would mandate a different conclusion that that reached by the Supreme Court of Florida in construing Article X, Section 6(a) of the Florida Constitution (1968).

II.

The manner of the taking in this case does not raise any federal question. The appellant's argument under this question turns on an interpretation of a state statute that involves no constitutional questions. Section 704 01(2), Florida Statutes, provides that use of a statutory way of necessity shall not constitute a trespass. Appellant does not argue that this provision is violative of the United States Constitution in itself but argues, and at each previous state of this proceeding has argued, that the statute should be interpreted so as to not afford the dominent property owner protection against trespass until he has filed an action under Section 704.01(2), Florida Statutes, or until a judgment is rendered in his favor. This argument has been rejected at each stage of this proceeding. If this provision of the Florida statute is not unconstitutional in itself, the time at which it applies should not give rise to a federal question.

III.

The Supreme Court of Florida has ruled that Sections 704.01(2) and 704.04, Florida Statutes, do not provide for attorney fees to be included in the compensation awarded to a servient landowner when a statutory way of necessity is found to exist over his land. Estate of Hampton v. Fairchild Florida Construction Co., 341 So.2d 759 (Fla 1977). The Supreme Court of the United States has ruled that the United States Constitution does not require an award of attorney fees in condemnation proceedings in the absence of statutory authority therefor. Dohany v. Rogers, 281 US 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930). If the United States Constitution does not require that attorney fees be awarded as compensation or costs when land is taken through the power of eminent domain, it should not require that they be awarded in a case involving a statutory way of necessity.

IV.

The distinction made by the legislature of

the State of Florida whereby attorney fees are awarded in cases of eminent domain because of a statute to that effect and they are not awarded in action brought under Sections 704.01(2) and 704.04, Florida Statutes, is a logical and rational distinction which would not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. A number of reasons can be advanced to support the difference in classification.

The legislature may have felt that fairness required a landowner confronted with the economic resources of the State in an eminent domain proceeding to receive reasonable attorney fees as part of his award. It may have felt that increasing the ability of the individual land owner facing a condemnation action to hire a lawyer would be a worthwhile restraint against overuse or abuse of the power of eminent domain by governmental authority.

There is a considerable difference between the results of an eminent domain action and an action for a statutory way of necessity. Con-

demnation results in the land being taken permanently and absolutely from the landowner. Section 704.01(2), Florida Statutes, only creates an easement for limited purposes for the period of time that it is reasonably necessary to provide access to the dominant property. While this may well be a long time, it does not take the fee simple title.

Since a statutory way of necessity comes into existence by reason of objective, observable facts, a cautious prospective purchaser can ascertain its existence, or potential for existence, prior to purchase in most instances. Ways on which these facts can be ascertained are by careful physical inspection of the property and adjoining properties and roads, by use of the owner and parcel maps prepared by the County Property Appraiser, and by talking with adjoining property owners. Eminent domain, on the other hand, normally implements a governmental decision which the landowner would have little opportunity to anticipate.

V.

In addition to raising the foregoing questions, the appellant complains that his right to trial by jury was violated. A jury was empanelled in this case and then temporarily excused while the trial judge heard the evidence on the appellees' defenses and counterclaims. These consisted of a claim that a common law easement existed or, alternatively, an easement had been created by prescription or, alternatively, the type of easement contemplated by Section 704.01(2), Florida Statutes, existed. The first two causes of action are equitable in nature and the later is of statutory origin in derogation of the common law. It was logical to try these issues first because if either of the first two causes of action were successful, it would have been a complete bar to the appellant's trespass action. If the latter was successful, it would be a complete or partial bar to the trespass action depending upon the conclusions of the trial judge. Section 704.04, Florida Statutes, provides that the trial judge shall determine the type, extent

and location of the easement and only the question of compensation submitted to a jury, upon demand. As it turned out, the conclusions of the trial judge with respect to the statutory easement afforded the appellees, FOLSOM, complete protection against the charge of trespass. At the heart of the appellant's contention that his right to trial by jury was violated is a refusal to believe that this is the law although it has been declared to be so at each stage of this proceeding. He insists in this appeal that the appellees, FOLSOM, committed trespass although the Florida courts have all ruled that they did not because of the protection afforded by Section 704.01(2), Florida Statutes.

On the other hand, the ruling of the trial judge on the existence of a statutory way of necessity was such that it afforded no protection against trespass to the appellee, FLORIDA POWER CORPORATION. When the trial was ready to proceed on the issues of trespass against FLORIDA POWER CORPORATION and just compensation for the statutory way of necessity, the parties agreed to

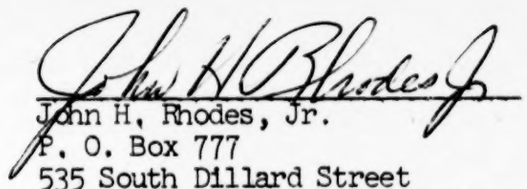
discharge the jury and submit these issues to determination by the trial judge. (Appellant's appendix p 159-161) For the appellant to imply that his decision to waive the jury trial was coerced by the schedule of the trial being tiring or demanding on the jury is unfair. This complaint was first raised at the appellate level. In fact, the jury had been released during most of the prior proceedings and there was no reason to think they were any more tired or inconvenienced than juries are normally.

The appellant suggests that a different order of trial would have produced a different result but offers no explanation of how or why this would occur. One can assume it would occur only by the trial judge improperly delegating his responsibilities to the jury or by the jury being hopelessly confused by the overlapping legal and equitable issues.

In short, the appellant was afforded a trial by jury on all the issues and causes of action that he had that were triable by jury

and he waived it.

Respectfully submitted,



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PROOF OF SERVICE

I, JOHN H. RHODES, JR., attorney for L. M. FOLSOM and PAULINE FOLSOM, his wife, appellees herein, and applicant for a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of October, 1978, I served three copies of the foregoing Motion to Dismiss on each of the several parties thereto, as follows:

On GILBERT D. SCUDDER and FLORIDA POWER CORPORATION, by hand delivery to their respective attorneys of record, as follows:

To JACK B. NICHOLS, Esquire, attorney for appellant, GILBERT D. SCUDDER, 108 East Hillcrest Street, Orlando, Florida, 32802;

To C. BRENT McCAGHREN, Esquire, attorney for FLORIDA POWER CORPORATION, 250 Park Avenue, South, Winter Park, Florida, 32789.

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